NO. 3093

United States

Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Appellant,

—vs.—

R. PETERSON,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

MORGAN and BREWER,
Hoquiam, Washington,
Proctors for Appellant.

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STATEMENT.

This is a libel in personam for damages alleged to have been caused to the "Jane L. Stanford" by reason of striking on the Grays Harbor Bar, while in tow of one of the appellant's tugs. The "Jane L. Stanford" is a barkentine of 861 tons burden and at the time of the alleged striking was in command

of Captain R. Peterson, the libelant. She was in tow of the appellant's tug "Cudahy," then in command of Captain Chris Olsen.

The libel charged in general terms, negligence on behalf of the company in that Captain Olsen was inexperienced and was at the time of the accident intoxicated; that he had never towed a vessel through this channel before, and that he attempted to tow the vessel through it at a wrong state of the tide, and when the weather was too rough for the purpose. The charges of inexperience and intoxication and of not having towed through this channel before, were practically abandoned by the appellee during the course of the proceeding. Practically all questions of negligence were eliminated, except that

> "said master of respondent's said tug negligently and carelessly towed said barkentine to sea across said bar when the sea breakers on said bar were too heavy, and the depth of water on said bar too shallow to enable said barkentine to cross said bar in safety."

Captain Chris Olsen was the most experienced in point of length of service of the Grays Harbor Tug Boat Company's captains. He was a licensed master and had been master of a tow boat for 27 years. He had towed in and out over Grays Harbor Bar continuously for 20 years and off and on for

about 7 years. He had towed out several hundred vessels, at least (R-78).

He is described as follow:

"He was considered a capable navigator" (Johnson-90). "He was a first-class man, and I have always heard that he was one of the best tug boat captains on the coast" (Chicoine-94). "As a master of a tug boat I will say he was the best on the coast" (Davidson-98). "Captain Olsen is a capable captain or navigator. I would say that he was as good a navigator as I would want to pick up anywhere" (Sanborn-116).

Captain Olsen was familiar with the channel. The channel was not new. It had been used during the preceding summer since the previous June or July. During that time it had been used by Captain Olsen for towing dismantled vessels used as rock barges. Sometimes he would take one every day, sometimes two a day, and sometimes there would be two or three days that he would not have any (R-85). The average draught of these barges was 19 or 20 feet, and the tonnage of the ships was from 1200 to 1600 tons. They were a great deal larger ships than the "Stanford," some of them were more than twice the tonnage of the "Stanford" (R-89).

"The channel then used and now used was the 'South Channel.' The 'South Channel' had more water and was a better channel than the 'North Channel'" (Olsen-79). "The channel used was the proper channel" (Johnson-90). "It was the customary channel at that time for towing vessels of that depth. It was deeper than the 'North Channel'" (Sanborn-107). It had about 25 or 26 feet of water at that time (R. 115).

Soundings taken a few seconds before the vessel struck (Libelant-54) showed four fathoms and a half of water, or 27 feet. This is sufficient for a vessel drawing 20 feet 2 in. aft (R-81).

In traversing the "South Channel" a range was followed. The course was Southwest by West, but in traveling, the tug boat went by a range. The range was laid by the red buoy and the Lone Tree on Damon's Point. You got your range after passing the red buoy. The actual crossing of the bar would be probably four or five hundred yards from the red buoy (R-83). The outer red buoy was a mid-channel buoy. The actual crossing of the bar would take about 10 minutes from the time the tug gets on the bar until the tow goes over (R-98). After leaving the red channel buoy you could not turn around (R-62).

The bar is shifting sand; just sand with no obstructions. The shoal part of the channel is straight. It is described as follows:

"You approach the bar with deep water all the way and there is a ridge and you go off that ridge into deep water again. There is a ridge of sand at the mouth of the harbor and what they call the bar is the deepest place and you cross it at right angles so it is pretty straight. It takes about a minute to cross the bar, it is less than a thousand feet perhaps. The depth of the water approaching the bar we maintain at forty-five feet and it gradually shoals up to the bar and the shoalest part we call it about three or four casts of the lead, about as far as one can throw it. We get about three or four of these casts in the shallowest water and then we are out in deep water again. The shallowest water at that time was about twenty-five or twenty-six feet of water at that time, it all depends on the heighth of the tide, some use larger and some smaller. The last hour before high tide is the best time to cross the bar. If you have a good-sized vessel to take across you would usually take the last hour to cross" (Sanborn, R-115).

"The day was the 25th of October; the hour about 4:00 P. M." (Log, "Printer"-118).

"The wind was north-northwest, blowing a slight breeze" (Libellant-38). "It was what I call a full sail breeze" (Libelant-61). "Pretty stiff breeze" (Johnson for Libelant-73). "Passed over bar at 4:00 P. M., bar smooth, wind north-northwest, weather fine" (Log, "Printer," R-118).

"The sea outside the bar was not choppy. The swells outside were not especially heavy" (Libelant 61). "There was no heavy sea at that time, just swells, heavy swells" (Thompson for Libelant-71).

The bar was not breaking. It was what was called lumpy. The libelant says: "When the tow got where it could see the bar it was very lumpy. It was not breaking. There were large, heavy swells." "It was not choppy. It was not breaking outside" (Libelant-61). His mate says: "There was no heavy sea at that time, just swells, heavy swells. I know that just at that time several heavy swells came in. No sir, I can not say that I observed any heavy swells before that" (Thompson-71). "No sir, I could not say that I saw unusual swells" (Johnson-73). This is the testimony of the libelant's witnesses.

The testimony of respondent's witnesses was that there was no unusual conditions on he bar. They say: "The bar was not breaking on that day.

There was no sign of a break on. It was an ordinary northwest chuck" (Olsen, R-85). "It was not what we call smooth; nothing breaking and no large chop on. I passed right by her (Stanford) going out" (Captain Johnson, R-90). "There was no condition of the bar that day to warn a tug not to cross the bar" (Chicoine, R-93). The bar was not very rough. It looked like it was fairly good. There was nothing unusual about the look of the bar that would warn a tug boat captain not to go over (R-97). "There was no unusual condition about the bar that we observed as the 'Stanford' was going over" (Davidson, R-98).

On the morning of the 25th before taking the vessel to sea, the appellant's captain had gone down to the bar to observe its condition. He then returned to a point near the "Stanford" and there remained until in the afternoon of that day. Before towing out the appellee's vessel, he returned to the bar and again observed its condition and returning to the place where the vessel anchored proceeded with her to sea.

The tug "Daring" in charge of Captain H. K. Johnson and towing the schooner "Fred J. Wood" preceded the "Stanford" to sea, and returning Captain Johnson passed the "Cudahy" at the red buoy

400 or 500 yards from the bar and a few minutes before the "Cudahy" crossed the bar (R-91). The tug "Printer" in charge of Captain Erickson and towing the "Americana" also preceded the "Cudahy" and according to the log of the "Printer" crossed the bar at 4:00 P. M. Both of these masters were experienced men and had been towing over Grays Harbor bar for a number of years. They met with no difficulty (R-61).

In passing over the bar the channel was followed as nearly as possible (R-79). The Captain followed a range. The range was astern. And the master in watching the range was watching the vessel all the time (R-80). Four witnesses on the tug boat testified that they were watching the tow at all times while crossing the bar and observed nothing unusual connected with such crossing. There is no evidence that the tug boat deviated from the channel in the slightest degree.

Five witnesses testify that when a tow touches upon the bar the effect is immediately perceptible upon the tug; that the mast and the top hamper of the tow shake; that the tow line begins to pay out; that it sometimes is necessary to throw water on the tow line to keep it from burning, and in effect that it is practically impossible for the tow to touch with-

out that fact being detected upon the tug. *Four reputable witnesses, none of whom were at the time of testifying in the employ of the appellant,* each testify that they were watching the tow constantly during the time the "Stanford" crossed the bar, and that they observed no indication that she touched upon the bar.

The libelant's witnesses testify that at the moment of reaching the bar, the vessel was struck by *three extraordinary* heavy swells. They are described by the libelant himself as follows: "The bar generally was rough but just as we struck there were three heavy rollers came in, three extra heavy swells came in. We were right in them; had no chance to get out of them (R-54). I certainly did watch the bar. I had my glasses out as soon as I was able to see it. Yes, when I got so I could see the bar it was very lumpy. I mean when a very big swell comes in, when it breaks off the bar, when it breaks then I call it very rough; I could not say this bar was breaking, but it was very lumpy. large heavy swells. These three extraordinary heavy swells (came), that was when we struck. I noticed them coming. They come probably every two, three or four minutes. *These three heavy swells were breaking two or three minutes before they struck us. You bet they were*

breaking (-60). When we got over the bar there were swells as there generally are in the winter-time; was not choppy; was not breaking. No, the swells outside were not especially heavy, they were swells that we generally have in the winter time from the southwest; the wind was northwest" (R-61).

"The fact is, we *did* encounter three heavy swells right on the bar (R-62). We caught the swells almost abeam. We were in three of them before we finished; three of them had to pass us. We were in the trough of each one of them (R-62). It took us probably two or three minutes to pass through these three swells" (R-63). He also says: "Had soundings of considerable depth of water just a minute or two before we started over the bar. A couple of minutes after we had considerable deep water" (R-62). "Before we struck we got four and one-half fathoms" (R-63). "The report he gave me a few seconds before she struck was four fathoms and one-half" (R-54).

His mate says:

Q: "What caused you to strike?"

A: "The only thing I can say was the heavy swells rolling in over the bar at the time. They were not what you could call heavy seas, but heavy swells;

just the time it struck I could not exactly swear to it (R-69). There was no heavy sea at the time, just swells, heavy swells; that is my opinion (R-71). *I know that just at that time several swells came in. Yes, came in, and that we struck* (R-71). No sir; I can't say I observed any swells before that reached the ship" (R-71).

The "Stanford" was laden with lumber. For about twenty-three days prior to the time she went to sea, the "Stanford" had been at anchor in Grays Harbor near Sand Island. On the night of Sunday, October 16th, or in the morning of October 17th, (R-118) the libelant says between 12 and 1 o'clock, the "Stanford" dragging two anchors blew ashore on Sand Island. "There was a storm that Sunday night blowing pretty good from the southwest. The vessel went aground on the north side of the channel, opposite Westport. She dragged up on the beach at low tide" (R-73). "She was lying over in the morning when the crew turned out" (Johnson, Libelant-74). The wind was south-southwest. It was what was called a "blow." She went aground on Sand Island near there. (Libelant-59). The place was described as follows: "It was sandy bottom, as far as I know; it is all sandy, whatever comes out of the water shows nothing but a soft muddy sand" (Libel-

ant-64). "She went on the sandspit on Sand Island" (Libelant-68). "The place where the 'Stanford' went ashore was as bad as any in Grays Harbor" (Sanborn-119). "Sand Island on that side is supposed to be hard sand" (R-94). "The ground was sandy, hard sandy bottom" (R-106). "It seemed to be sand as far as could be seen at low tide" (R-99). The trial court gained the impression that the "Stanford" grounded on mud, but no witness testified to that effect. (The only reference to mud being the log of the "Printer" as follows: "Oct. 17, 6:00 A. M., 'Left Hoquiam for sea, towed boat Jane L. Stanford off mud to safe anchorage' "). All the witnesses testified that the "Stanford" went ashore on the hard sand on the southern end of Sand Island.

The morning of Monday, the 17th of October, was stormy, with a southeast wind. Captain Johnson of the Tug "Daring" first discovered the "Stanford" ashore on Sand Island. As soon as the tide floated her she commenced to pound. She pulled off hard. The "Daring" was the most powerful tug on Grays Harbor. It was described as follows: "The 'Daring' pulled her probably near an hour, or something like that." "It was pretty rough water. It is always rough on spits on a rolling swell." "A vessel the size of the 'Stanford' and laden with lumber and pounding on a sand, is going to damage herself."

"Her seams are going to open" (R-91). Captain Johnson says: "Yes, I say she was pounding on the bar. Yes, you take any vessel laying on a bar will pound, with the flood tide coming in. You need not tell me about the spits down there, I call tell you lots about it. I say the "Jane L. Stanford' was on a bar and was pounding; yes, sir; she had a list" (R-91). After pulling probably an hour, the "Daring" turned the "Stanford" over to the "Traveller," Captain Sanborn. Captain Sanborn had hold of her four or five hours. She came off quite hard. He observed her before she came off and she was apparently pounding. The "Daring" towed her off stern first and the "Traveller" took hold of her bow and held her while the "Stanford" got her anchors up (R-106). "One anchor laid in quite far in shoal water and we tried to hold him off from swinging all we could until he got hold of his anchor. I forget whether he had both anchors down or not, anyway one was quite foul. It was high water and he was right over his anchor" (R-107). Otto Rohme, witness for the respondent, testified that at this time the anchors were close to the vessel. When he first saw her she was hard aground, but when the tide came in she was working heavy on the sandspit. The water was rough inside the harbor when she went aground, very rough. When the tide came in she was thumping hard. It

pounded her a lot and shook her up (R-102).

When the vessel was placed upon drydock her injuries were described as follows: "She had apparently hit with her keel on sandy bottom; about thirty feet of the outer shoe and ten feet of the inner shoe on the keel were torn off the whole length, the whole after end of the vessel, extending to about one-third of her length; the vessel was all shaken in the seams; the butts along the bottom and all over the vessel were more or less started; the keel in several places on the places mentioned before, the pieces of the shoe split off and in some places cut in deep enough to take off or scalp off the keel; in the vicinity of the foremast, underneath the foremast on the port side there were two pretty deep cuts and the planks bruised and cut in about two and a quarter inches deep. The keel right opposite that place was slightly damaged, and the shore for a distance of about ten feet badly split up, and quite a portion of it gone. Right across the starboard side of the planks there was one bad bruise and a score of considerable length; these latter damages were fresh and had apparently been made by the vessel going upon sharp rocks; also places damaged along the keel to about within thirty feet of her heel; the stern post was found set about one-fourth of an inch in the ship's counter; rudder

not working true" (R-109 & 110).

All of these injuries could have been received, and it is more probable that they were received, when the vessel was ashore on Sand Island, October 17th, than by touching upon the bar on October 25th (R-91, 109, 110, 112, 119, 105).

She could not have received these injuries, particularly the cutting and scoring, on Grays Harbor bar (R-109, 111). She might have received the cuts and bruises by lying on her anchor (R-108).

"The 'Stanford' was due for the drydock for cleaning and painting" (Libelant-64). There was no drydock on Grays Harbor that would accommodate a vessel of this size (R-91).

ASSIGNMENTS OF ERROR.

The respondent and appellant hereby assign errors in the rulings and proceedings of the Honorable District Court as follows:

—1—

For that the Court refused to sustain its exceptions and objections to the libel.

—2—

For that the Court erred in the findings of fact recited by it in its memorandum decision of April 16, 1917, for that such findings of fact are not in accord with the evidence in the cause, but are di-

rectly contradicted by the testimony in the cause and the evidentiary facts relating thereto, and particularly with reference to the finding that the captain of the respondent's tugboat, or the respondent itself, was negligent in any respect.

—3—

For that the Court erred in its conclusions of law as noted in said memorandum decision for this, that the conclusions stated by the Court do not follow as a matter of law from the facts as found and recited by the Court in said memorandum decision.

—4—

The trial court erred in its findings of fact upon which the judgment herein was based, that the captain of the respondent's tug was at fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water, as the preponderance of the evidence, and the evidence as a whole, showed the contrary.

—5—

The trial court erred in holding as a matter of law that the burden in this case was upon the respondent to free itself from the blame by reason of the fact that it held as a matter of fact that the tow had been damaged by striking upon the bar while in charge of the tug, as this is contrary to the

rule of law under such circumstances.

—6—

The trial court erred in finding that the tug of the respondent was guilty of any negligence whatsoever that produced the damage, or any damage, to the tow, as the evidence was wholly to the contrary.

—7—

The trial court erred in failing to find that the respondent and the tug exculpated the tug and those in charge of her wholly from any negligence under the circumstances shown by the evidence.

—8—

For that the Court erred in entering a final decree in favor of the libelant and against the respondent in that such decree was not founded upon nor jutsified by any testimony in the cause, nor was such decree justified by the law flowing from the facts as found by the Court.

—9—

The Court erred in that it ordered, adjudged and decreed that the libelant should recover against the appellant the sum of Nine Thousand One Hundred Sixty-nine and 70/100 ($9,169.70) Dollars, or should recover any sum at all.

For that the Court erred in that it did not make a decree dismissing the libel with costs to this respondent in the District Court.

ARGUMENT AND AUTHORITIES.

The questions of the law involved are simple and in our view resolve themselves to two questions which we will discuss together. This case rests entirely upon the sufficiency of these circumstances, to charge the master and through him the owners with negligence, or, on the other hand, to exonerate him, or in any event, the owners, from blame. For this reason we have recited the facts with great particularity. The trial Court did not find, and of course from the evidence could not find, any positive proof of negligence on the part of the tug boat's master. The charges of incompetence and intemperance, of course, fell to the ground. There was no evidence that the hour selected was not the proper hour, but positive evidence to the contrary. There was no evidence that the vessel was out of the channel. The trial Court states his findings in that respect in these words:

> "It is not unlikely that the towing was undertaken too long a time prior to flood tide, or the 'Stanford' may have gotten out of the channel,

> but if so these facts are not made clearly to appear."

The trial Court, therefore, in order to hold the defendant liable was compelled to adopt, and did adopt, the doctrine of *res ipsa loquitor*, and states his conclusion in that respect in these words:

> "Under such circumstances the rule that damage to the tow does not ordinarily raise a presumption against the tug does not obtain, * * * and the burden shifts to the respondent to free itself from blame."

So that in our view this question narrows down to these specific points: First, as to whether or not the trial Court is correct in his conclusion as to the burden of proof; Second, this additional question which we claim to be pertinent and controlling which stated in the affirmative form is:

Even though the master of the vessel be found at fault in the particulars mentioned, *under the circumstances of this case* the appellant owners are not chargeable with his negligence, inasmuch as such fault if it existed was an error of judgment for which the owners would not be liable.

A tug is not a common carrier or an insurer of the tow.

As stated first by Justice Strong, repeated by Chief Justice Fuller, and quoted and approved by Justice Grey:

"An engagement to tow does not impose either an obligation to insure or the liability of common carriers. *The burden* is always on him who alleges the breach of such a contract to show either that there has been no attempt at performance or that there has been negligence or unskilfulness to his injury in the performance."

Unlike the case of common carriers, damages sustained by the tow does not ordinarily raise a presumption that the tug has been at fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

The "J. P. Donaldson" (1897, Jutice Gray).
167 U. S. 599-606;
42 Law. Ed. 292;

The "L. P. Dayton",
120 U. S. 337-353;
30 Law. Ed. 669;

The "Webb" (Justice Strong),
14 Wall. 406-418;
20 Law. Ed. 774;

The "William E. Gladwish (2nd. Cir.)
196 Fed. 490;

The "Kunkle Bros."
211 Fed. 542-543;

The "Patrick McGuirl, (2nd. Cir.)
200 Fed. 570;

The "Winnie" (2nd. Cir.)
149 Fed. 726;

The "W. H. Simpson" (7th Cir.)
80 Fed. 153.

There is no presumption of negligence from the fact of disaster and the burden of proof is put upon the Libellant to satisfy the Court upon the evidence presented and upon the reasonable probabilities of the case, that the tug was guilty of the fault charged.

The "J. P. Donaldson",
167 U. S. 603;
42 Law. Ed. 292;

The "W. H. Simpson",
80 Fed. 153;

The "Winnie" (2nd. Cir.)
149 Fed. 725;

The "Patrick McGuirl" (2nd. Cir.)
200 Fed. 571;

This is of course so well established that citation seems superfluous. However, it is claimed that there is an exception to the rule.

Of late some of the District Courts and one of the Circuits have so honored the rule in the breach and the exception in the observance as to reduce the rule to a shadow.

If this rule is to have any force it should be applied. If it is to be whittled away by exception to

such a point that its practical application is impossible, then it should be abandoned.

The true application of rule and exception are well stated by this Court in the Pederson case, as follows:

> "In cases where *no questions are raised as to what caused the accident or injury* and the circumstances are of such a character as to show that the thing which did happen would not have occurred unless there was negligence on the part of the person having charge and control of such thing, then the presumption contended for (that the happening of the accident raised a presumption of negligence) would apply."
>
> Pederson vs. John D. Spreckles & Bros. Co., 87 Fed. 941.

Let us see how the trial Court applies these rules:

> "That the towing was undertaken too long prior to flood tide, or the 'Stanford' may have gotten out of the channel, but if so these facts are not made clearly to appear."
>
> "But whether the striking was caused by one reason or the other, the captain was negligent." (Opinion R. 39).

Again:—

"Grays Harbor was the home port of the tug. It was the captain's duty to know the depth of water and the channel."

In other words:—

(a) Striking on Grays Harbor Bar indicates that the water is too shallow, or the vessel is out of the channel.

(b) The Captain is bound to know both facts.

Therefore, any striking on Grays Harbor Bar is negligence for which the Grays Harbor Tug Boat Co. is liable.

What difference in practical effect is there between this specuous argument and saying in so many words:

"The tug boat is an insurer of the safety of its tow in crossing Grays Harbor Bar," and

"Any touching of the tow on Grays Harbor Bar creates a presumption of negligence on the part of the Grays Harbor Tug Boat Co."

It is not an uncommon thing for vessels to touch on Grays Harbor Bar. It is one of the perils attendant upon navigating these waters, and has so been recognized for years. It does not appear from the record, except as jetties are mentioned therein, but the fact is, the Government has expended millions of dollars in an effort to improve Grays Harbor Bar. Its navigation has always been and is now perilous. Heretofore, such peril has been shared by tug and tow alike, but now, if this decision is to stand, the

peril is shifted by a word, by a mere *ipse dixite* to the Grays Harbor Tug Boat Co., and it becomes for all practical purposes an insurer of every vessel it assumes to tow across the bar.

We can not believe that this is the law.

The trial Court completely ignores this other well established rule so well expressed by Justice Strong in "The Webb":

> "The contract (to tow) requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

"The Webb",
14 Wall. 406;
20 Law. Ed. 775;

The "W. H. Simpson" (7th Cir.),
80 Fed. 153;

The "Samuel Bouker, D. C.,"
141 Fed. 480;

The "Winnie" (2nd. Cir.),
149 Fed. 725;

The "Oak" (4th Cir.),
152 Fed. 973;

Pederson vs. John D. Spreckles Co., (9th Cir.)
87 Fed. 942.

This rule too is so well established that citation is a sort of affront to the Court. Applying the rule to this case, in what respect can it be said that

Captain Olsen failed to act in a careful and prudent manner? He had grown grey in the service of the Tug Boat Co. He was, as stated by the Libellant himself, supposed to "know more about that (the channel) than anybody else." He twice went down to the bar to look at it before towing the Libellant across. Two other grizzled veterans in the service towed out ahead of him safely, the bar was not rough. There was nothing to warn him of any dangerous condition, the weather fine, wind northwest, bar smooth. The Libellant had his sailors aloft spreading all his available canvas. He kept the channel carefully, observed the vessel minutely while crossing and was astonished to learn after the crossing that the vessel had touched. In what respect can it be said that he has not "carried out his undertaking with that degree of caution and skill which prudent navigators employ?" No man hath testified against him. No man has said his conduct was otherwise than prudent and skilful. He is damned by a presumption, and just such a presumption as the Supreme Court often and the other Courts many times have said could not be indulged.

The question of Captain Olsen's conduct, his prudence and foresight, is a practical one.

As said by Judge Brown in "The Allie & Evie," 24 Fed. 745:—

> "In whatever form the question comes up, whether as to seaworthiness, adequacy for the work or time of starting, it is a practical question of reasonable prudence and judgment * * * there is no other final criterion than the judgment of practical men versed in the business and the customs and usages of the time and place."

So in this case, the time and place for crossing Grays Harbor Bar, the condition of tide, sea and weather, are questions for the judgment of practical men skilled in this business.

But no, the trial Court sitting in his chambers at Tacoma, with no knowledge of the perils of the seas, certainly with no knowledge of the dangers of navigation of Grays Harbor Bar, condemns this veteran of the seas, brands him with negligence and unskilfulness, and mulcts his employers in more than $9,000 and all upon the testimony of no man, but rather upon a presumption from the happenings of the accident.

The truth of this matter is that the injury if it occurred on Grays Harbor Bar was one well described by this Court with reference to another,—

> "The misfortune which befell the Schooner is to be attributed not to faulty navigation, but to the inherent dangers of the undertaking."

It has been recently said:

> "A standard of prudent conduct for the handling of a tow in a storm at sea set up after the event by one not present must be regarded with the greatest caution."

Olsen vs. Luckenback, 238 Fed. 238;

and that applies with the greatest force to the case at bar.

The trial Court ignores another well established rule, that is,—

> "Where the master of a tug is an experienced and competent man * * * a mere error of judgment on his part will not render the tug liable for the loss of her tow."

The "William E. Gladwish," (2nd. Cir.) 196 Fed. 490;

The "Garden City," (6th Cir.), 127 Fed. 298;

The "E. Luckenback," (2nd. Cir.), 113 Fed. 1017;

The "Battler," (3rd. Cir.), 72 Fed. 537;

Applying this rule to the facts of this case. The trial Court did not find what the cause of the accident on the bar, if any, was. This matter is left wholly in conjecture. There is no doubt that there was sufficient water on the bar to enable the "Stanford" to cross without danger in a perfectly calm sea. She had more than six feet of water under her a "few seconds" before she struck. She was in the channel then. If she struck it was on account of

the swells, that is, of the action and conditions of the seas at that particular time and place. A miscalculation on the part of Captain Olsen *as to the size of the swells, the direction and force of the prevailing seas*, would constitute a mere error of judgment for which the appelant would not be liable. These conditions are changing conditions. They change from day to day, from hour to hour. The channel as such is reasonably fixed. A master may know within reasonable limits what the height of the tide will be, but no man can state with certainty what will be the condition of the seas on Grays Harbor Bar. At times a child might cross with a skiff, at other times the stoutest vessel dare not cross. To make a miscalculation as to the height and force of these swells is to make *an error of judgment*, and not a *mistake of fact*, which seems to be the distinction made by the Courts.

The Libellant and his witnesses testify that just at the moment of crossing, the "Stanford" was met by *three extraordinary swells*. If this is true, it shows a changed condition on the bar at that moment. True, the trial Court disbelieves this testimony and disregards its effect. If this testimony is true, surely such a change in circumstances would constitute a peril of the seas for which the appellant could not be held responsible.

We then have this curious situation: In order to enable the Libellant to recover, his testimony and that of his witnesses must be disregarded, in fact, held to be false testimony.

If the testimony of Libellant is true and three extraordinary waves arrived just at this moment, then, indeed, the fault of Captain Olsen was a mere error of judgment for which appellant could not be held.

There is another matter which seems to us to be decisive of this case:

Ten days before the "Stanford" crosed the bar, she was admittedly ashore on Sand Island. She inevitably received injuries. She lay over on her side, she pounded on the sand. Her seams must start.

Who can say that she did not receive all, or the greater part, of her injuries there? She was due to go on drydock anyway. There was none on Grays Harbor. If she received such injuries on the sandspit, she must be repaired. She *must* reach the Columbia River. The fact that such voyage might be dangerous would not help the matter. *She had to reach a drydock on the Columbia River*, or lay in Grays Harbor and rot.

After the sandspit experience the crew mutinied and left the ship. A new crew was obtained which also deserted as soon as they reached Portland. The ship was lumber laden and could not sink. While

such an undertaking was difficult it was not particularly dangerous as the event showed. The master had only to reach Columbia River Light some 60 miles away. It is to be remembered she *must reach the Columbia.* All these are pertinent facts going to show that these injuries were received on Sand Island and not on Grays Harbor Bar.

Who can say that these injuries were not received there? The burden of proof was as much on the appellee to show that the injuries received were caused by the vessel touching on the bar, as it was to show that it touched on the bar at all. That is, it had the burden of showing not only that the vessel touched, but also that such touching resulted in the injuries for which we are charged. This it not only did not do, but we were able to show that such injuries were received elsewhere. These injuries could not have been received on Grays Harbor bar. Some of the chief of them consisted of cuts and bruises far up on the starboard bow, and across on the port bow. As shown by the testimony, this could not happen on sand such as that of which the bar consists. It is suggested by the trial Court that perhaps while in the trough of the sea she laid over sufficiently to strike her starboard bow on the bar. This illustrates the perils of a landsman specu-

lating on matters pertaining to the sea. To do this she would have to lie over at an angle of 45 degrees. No such maneuver has been testified to or suggested. Moreover, had she ever gotten in such a position and struck heavily on the bar sufficient to bruise her planking, she would have been wrecked right there and then. A heavily laden vessel is not built to resist such strains. A sailor, any sailor, would laugh at such a thing. Of course Captain Sanborn is correct when he says she could not receive such injuries as these on Grays Harbor Bar.

If from all these things the Court is unable to say what, if any, injuries were received on the bar, on what theory can the appellant be held for any part of the cost of repair?

We respectfully represent that upon all the testimony the Libellant was not entitled to recover and we ask the Court to reverse the cause, direct its dismissal and grant us our costs.

Among the items allowed by the Court was one of $50.00 allowed to the Libellant for "personal meals, carfare, etc.," while the vessel was lying in drydock. The captain was allowed his wages and captain and crew living expenses. (R. 46). Also, an item was allowed of $250.00, paid to John Grant as commission for obtaining a new crew, the old one

having deserted on arrival in Portland. The Libellant calls this "blood money."

The expenses of a general average presented in this form and without any testimony except as to the fact of payment, were allowed by the trial Court in the sum of $160.80.

This cause was begun in 1910. It was allowed to hibernate by the Libellant until 1917, when it was brought on for hearing. The Court refused to allow interest for the full term, but did allow interest for five years. We submit that interest should have been allowed, if at all, from the date of the trial Court's opinion on the merits at which time liability became fixed for the first time.

If the trial Court should by any chance find that there was liability, we respectfully call the Court's attention to these improper items.

Respectfully submitted,

MORGAN & BREWER,

For Appellant.